

**BEFORE THE  
NATURAL RESOURCES COMMISSION  
OF THE  
STATE OF INDIANA**

**IN THE MATTER OF:**

<b>PROPOSED RULE, 312 IAC 20-4-11.5,</b>	)	<b>Administrative Cause</b>
<b>ESTABLISHING DUAL REVIEW OF</b>	)	<b>Number 11-137H</b>
<b>PROJECTS SUBJECT TO 16 U.S.C 470f</b>	)	
<b>AND IC 14-21-1-18</b>	)	
	)	<b>(LSA Document #13-3(F))</b>

**REPORT ON RULE PROCESSING, PUBLIC HEARING, HEARING OFFICER  
ANALYSES AND RECOMMENDATION REGARDING FINAL ADOPTION**

**1. RULE PROCESSING**

For consideration is proposed new rule section 312 IAC 20-4-11.5, which would allow an applicant to request the DNR's Division of Historic Preservation to coordinate, into a single process, similar reviews required by Federal regulation (16 USC 470f) and State statute (IC 14-21-1-18).

IC 14-21-1-18 states

A:

- (1) historic site or historic structure owned by the state; or
  - (2) historic site or historic structure listed on the state or national register;
- may not be altered, demolished, or removed by a project funded, in whole or in part, by the state unless the review board has granted a certificate of approval.

The Federal counterpart, 16 USC 470f, states

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.

36 CFR 800 provides the review procedures under Section 106.

For the proposed new rule section, licensure (a “certificate of approval”) would still be completed through the DNR, but the applicant would not be required to complete two separate but similar licensure processes.

Proposed new rule section at 312 IAC 20-4-11.5(i) would also provide that the Director of the Division of Historic Preservation and Archaeology shall issue a “letter of clearance” to the INDOT for a bridge project covered by the July 17, 2006 “Programmatic Agreement” if the division director concludes the objectives and purposes of IC 14-21-1-18 are achieved.

A temporary rule governing the same subject matter was approved by the DNR Director and filed with the Legislative Services Agency (the “Publisher”) as LSA Document #12-453(E). The temporary rule became effective August 1, 2012, and was posted in the Indiana *Register* at 20120801-IR-312120453ERA. This instant rule proposal would make the review process set forth in the temporary rule permanent.

The Commission gave preliminary adoption to the rule amendments on July 17, 2012. As reported in the pertinent portions of the July 17 minutes:

James Glass, Director of the Division of Historic Preservation and Archaeology, presented this item. He explained the current separate Federal and State review processes and the proposed streamlined process being recommended for preliminary adoption.

Glass said under the current process, if a State agency uses both Federal and State funds for a construction project, “we require that the agency go through the two regulatory processes required by Federal law and State law in separate reviews.” The Federal process under Section 106 of the National Historic Preservation Act (16 USC 470f) “is based on the solicitation of public comments and interested parties as a central part of an agency considering the effect of its projects on historic properties.” These include archaeological sites. For the State process that is based on IC 14-21 “certificates for approval” are issued by the Indiana Historic Preservation Review Board (“IHPRB”) in a process that “entails notice to interested parties and public after an application for a certificate has been filed by a State agency.”

Glass stated that in most cases in a dual review, where both Federal funds and State funds are both being used, the State agency identifies consulting parties at the outset of Section 106 review and offers an opportunity for a person to participate in a consultation concerning “whether historical properties are present, the nature of the project’s effect on any such properties and how any adverse effects may be avoided, lessened, or mitigated. If there is an adverse effect that is not avoidable, the State Historic Preservation Officer (“SHPO”) and consulting parties discuss ways to mitigate the effect.” In Indiana, the SHPO is the Director of the Division of Historic Preservation and Archaeology. “A

binding memorandum of agreement is drawn up by the lead agency to carry out the mitigations. The memorandum of agreement is then signed by the Federal government and the leading State agency, a local recipient of Federal funds and other consulting parties.” The Section 106 process is rigorous and lengthy. “After the memorandum of agreement is signed for Section 106, if State funds are also being used, the State agency then files an application with the Division of Historic Preservation and Archaeology for a certificate of approval under IC 14-21-1-18. Section 18 provides that any historical structure or site owned by the State, or listed on the State or the National Registers of Historical Places, may not be altered, demolished or removed by a project funded in whole or part by the State, unless the IHPRB has granted a certificate of approval.”

Glass said a “review of INDOT-sponsored projects since 2003, involving both Federal funds and State funds, shows that out of 22 projects, 21 (or 95%) were approved by the IHPRB. When Section 106 review process was completed through a memorandum of agreement, the IHPRB opposed no project changes or additional mitigations. When Section 106 was not yet completed and when the IHPRB considered the project, the outcomes of the two processes were the same. Out of the 22 projects, two projects involved objections from interested parties or members of the parties present at the IHPRB meeting. The outcomes in both of the cases were the same as that of Section 106 review consultation. In general, because Board members believed that thorough consideration of the project opinions had already taken place through the Section 106 review, and because they believed interested parties were involved in consultation through the Federal process, the IHPRB was satisfied with the Federal process result and the mitigations proposed.”

Glass said under proposed 312 IAC 20-4-11.5, “the review process would be streamlined in situations where both Federal and State funds are being used by a State agency for a project. The agency would submit a proposal for dual review” under Section 106 of the Federal law and under Section 18 of the State law. The Division of Historic Preservation and Archaeology “would acknowledge receipt of the dual review submission, notify interested persons and members of the IHPRB, and post a notification on its website. If the submission resulted through a Section 106 review and a finding of no adverse effects on historic properties, and the Division Director concurred with the finding, he or she would issue a letter of clearance for the project under the proposed rules. If a submission results in a finding of adverse affect and a memorandum of agreement is executed under Section 106, the Division Director would consider the terms of the memorandum. If it is concluded the objective and the purpose of Section 18 had been satisfied, the Division Director would issue a letter of clearance, exempting the person or the agency from obtaining a certificate of approval” from the IHPRB.

Glass said that if the Indiana Department of Transportation (INDOT) would make a submission for a project involving a bridge covered by the 2006 “Programmatic Agreement Among the Federal Highway Administration, the Indiana Department of Transportation, the Indiana State Historic Preservation Office, and the Advisory Council for Historic Preservation Regarding the Management and Preservation of Indiana’s Historic Bridges”, and a finding of adverse effect resulted under Section 106, the Division Director would consider the mitigations prescribed under consultation, and if concluding the objectives and purposes of Section 18 had been achieved, the Division Director would issue a letter of clearance. If a letter of clearance was issued under any of the subsections of the proposed rule, the Division Director would provide notice of the decision to the interested persons and to members of the IHPRB. Any member of the

review board would then have the option of requesting that an application for certificate of approval be placed on the agenda of the IHPRB for consideration at its next meeting. If a dual review was initiated that resulted in a finding of adverse effects under Section 106, but no memorandum of agreement providing mitigations was executed, the State agency that initiated dual review would be required” under proposed 312 IAC 20-4-11.5 to obtain a certificate of approval from the IHPRB.

Glass added that under the proposed rule “there would be a full vetting of each project under Section 106 review, and several opportunities for consultation with interested parties and the general public on identifying historic properties, coming to conclusions of the nature of effects on historic properties and discussing ways to avoid, lessen or mitigate any adverse effect leading to a memorandum agreement. Interested parties would be informed of each project’s submission involving dual reviews at the outset of the project. In addition, members of the IHPRB would be informed, and notice of the dual review posted” on the website of the Division of Historic Preservation and Archaeology. If clearances are proposed, the interested parties and members of the IHPRB would be notified, “and its members would be afforded an opportunity to request the full Board to consider an application for certificate of approval at its next meeting.”

Glass concluded, “We would expect that based on the experience with previous reviews under both State and Federal law, that in most of the projects in which dual review is initiated, a certificate of approval would not be required from the IHPRB, which would reduce staff time and other costs for our Division and for submitting State agencies.”

The Chair thanked Glass for his well-presented report. He invited Patrick Carpenter to speak.

Patrick A. Carpenter, Section 106 Consultant within INDOT’s Environmental and Cultural Services Section, addressed the Commission. He said “INDOT supports the adoption of the dual review rule.” Proposed 312 IAC 20-4-11.5 would benefit the agency’s efforts to comply with Federal reviews on Section 106 and State reviews under IC 14-21-1-18. “As Dr. Glass mentioned, the outcomes of the State and Federal reviews are almost identical, and INDOT would like to see the streamlining of that.” He added the rule proposal would also be a benefit for IHPRB members “because, as Dr. Glass mentioned, we go to the review board when Section 106 is complete to show the members we went through this lengthy consultation. Now they will get a chance to participate in a project early on.” Carpenter stated that the proposal would also benefit INDOT because if an IHPRB “member were to object to a project or request a continuance, it could jeopardize the project’s schedule. If we know there are objections or problems with the project early on, it gives us a greater chance to address those concerns. So, in summary INDOT supports the dual review adoption, as it will enhance our project consultation by giving more opportunities for the review board members and reduce the redundant processes and gives more predictability to project outcomes.”

Doug Grant moved to approve preliminary adoption of proposed 312 IAC 20-4-11.5 to coordinate historic preservation reviews for State agencies proposals that are governed by both Federal and State law. Thomas Easterly seconded the motion. Upon a voice vote, the motion carried.

The “Notice of Intent” to adopt a proposed rule amendment was posted to the Indiana *Register* at 20130109-IR-312130003NIA on January 9, 2013. The notice identified Chad Slider, DNR, Division of Historic Preservation and Archaeology, as the “small business regulatory coordinator” for purposes of IC 4-22-2-28.1.

Executive Order: 13-03, §8, posted in the Indiana *Register* on February 6, 2013 at 20130206-IR-GOV130031EOA, required state agencies to notify the State Budget Agency’s Office of Management and Budget of all pending, non-final rules for which a notice of intent to adopt a rule under IC 4-22-2 was submitted to the Indiana *Register* on or before January 14, 2013. On February 25, 2013, a list of pending, non-final rules, along with corresponding information required by §8, was emailed to the Office of Management and Budget. For the instant rule proposal, the following was submitted:

...

**a. a summary of the proposed rule**

The proposal would add 312 IAC 20-4-11.5 to allow but not require an applicant to cause DNR’s Division of Historic Preservation and Archaeology to coordinate, in a single process, similar reviews that are required by State statute and by Federal statute. The proposal would improve regulatory efficiency and increase opportunities for public participation in decisions regarding historic sites and structures. The opportunity to use this joint permit is currently provided by temporary rule.

**b. a statement regarding the proposed rule’s potential to promote private-sector job growth or foster private-sector economic development**

The direct effect of the amendment would be improved efficiencies to DNR’s Division of Historic Preservation and Archaeology and to other State agencies (most notably INDOT). An applicant could combine the similar but not identical reviews required by State law at IC 14-21-1-18 and by Federal law at 16 USC 470f (including 36 CRF 800) into a single process. Under State law, approval is required prior to alterations to a historic site or historic structure owned by the State, or for a historic site listed on the National Register or the State Register, if State funding is involved. Private-sector job growth or fostering private-sector economic development could be supported because the amendments would allow private contractors access to construction projects more quickly and potentially at diminished costs.

**c. an estimated date of the proposed rule’s adoption**

August 2013 is the estimated date of the proposed rule’s adoption.

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As specified by Executive Order, proposed fiscal analyses of the rule proposal were submitted, along with a copy of the proposed rule language and a copy of the posted Notice of Intent, to the Office of Management and Budget on January 10, 2013. In a letter dated April 17, 2013,

Christopher D. Atkins, Director, Office of Management and Budget, recommended that the proposed rule amendments be approved.

The Division of Hearings submitted the rule proposal to the Legislative Services Agency, along with the “Statement Concerning Rules Affecting Small Business” (also known as the “Economic Impact Statement”), on April 22, 2013. The Notice of Public Hearing was submitted to the Legislative Services Agency on April 24, 2013. On September 14, 2011, the following were posted to the *Indiana Register*: the text of the proposed rule at 20130508-IR-312130003PRA; the notice of public hearing along with the justification statement (IC 4-22-2-24(d)(3)) at 20130508-IR-312130003PHA; and the Economic Impact Statement at 20130508-IR-312130003EIA. The Economic Impact Statement was posted as follows:

**TITLE 312 NATURAL RESOURCES COMMISSION**

**Economic Impact Statement**

LSA Document #13-3

**IC 4-22-2.1-5 Statement Concerning Rules Affecting Small Businesses**

**Estimated Number of Small Businesses Subject to this Rule:**

None.

**Estimated Average Annual Reporting, Record Keeping, and Other Administrative Costs Small Businesses Will Incur for Compliance:**

None.

**Estimated Total Annual Economic Impact on Small Businesses to Comply:**

None.

**Justification Statement of Requirement or Cost:**

No costs to small businesses are anticipated.

**Regulatory Flexibility Analysis of Alternative Methods:**

Not applicable.

Following receipt of an “Authorization to Proceed” from the Legislative Services Agency on April 24, 2013, the NRC, Division of Hearings, caused a Notice of Public Hearing to be published by the Indianapolis Newspapers in the Indianapolis *Daily Star*, a newspaper of general circulation in Marion County Indiana, on May 4, 2013.

## **2. PUBLIC HEARING**

### **a) Public Hearing**

On June 10, 2013, the public hearing was convened as scheduled by Stephen Lucas of the Commission's Division of Hearings. In attendance were Chad Slider, Historic Structure Reviewer with the DNR, Division of Historic Preservation and Archaeology, Patrick Carpenter, Section 106 Specialist of the Indiana Department of Transportation (INDOT), and Jennifer Kane, Paralegal of the Division of Hearings. No member of the public appeared.

Chad Slider explained the opportunity afforded by the current temporary rule and the proposed permanent rule would likely have the most frequent utility for the INDOT and the Indiana National Guard. During the applicable period of the temporary rule, the opportunity was relevant in two instances, each, for these agencies.

Patrick Carpenter explained the subject arises most prominently for the INDOT with respect to historic bridges. Having the opportunity supports agency efficiency without compromising laws designed to afford protections to historic sites.

No written comments were received regarding this proposal.

## **3. HEARING OFFICER ANALYSES AND RECOMMENDATION REGARDING FINAL ADOPTION**

According to the *Indiana's Cultural Resources Management Plan for 2013 to 2019*

The Division of Historic Preservation and Archaeology (DHPA) is the designated State Historic Preservation Office (SHPO) for Indiana. The DHPA's location within the Indiana Department of Natural Resources mirrors the structure of the federal government's official preservation agency; the National Park Service is located within the U.S. Department of the Interior. As the state-level counterpart to the National Park Service, the DHPA is the key partner for federal preservation programming in Indiana.

The DHPA's staff of about 30 people includes professional preservationists, archaeologists, and historians, as well as support staff and contract employees. The director of the DHPA is the Deputy State Historic Preservation Officer. Together, the director and staff of the DHPA are charged with the day-to-day administration of state and federal programs for preservation and archaeology in Indiana.

The DHPA carries out provisions of both the National Historic Preservation Act of 1966 as amended and the Indiana Historic Preservation and Archaeology Act (IC 14-21-1). Regular duties of the SHPO include identifying and documenting historic structures and archaeological sites, processing nominations to the State and National Registers, conducting legally required reviews of state and federally assisted projects for the consideration of cultural resources, and managing financial incentive programs for preservation activities. In addition, the office promotes heritage education for the general public, manages a statewide database of above-ground and below-ground cultural resources, develops new initiatives to address identified needs, and engages in partnerships and collaborative efforts that will help achieve Indiana's goals for cultural resource management and preservation education.

*Indiana's Cultural Resources Management Plan for 2013 to 2019*, Indiana Department of Natural Resources, Division of Historic Preservation and Archaeology, December, 2012, p. 9 (<http://www.in.gov/dnr/historic/files/hp-IndianaStatePlan2013-2019.pdf>)

The proposed new rule section would streamline and support administrative efficiency regarding what can be redundant reviews of projects under IC 14-20-1-18 and its Federal counterpart, 16 USC 470f. Use of the rule section is at the option of the applicant and is not mandatory. The proposal seems unlikely to detract from the vitality of either the Federal initiative or the State initiative for affording protection to important historical resources. The proposal generated no controversy. The Hearing Officers recommend the proposed 312 IAC 20-4-11.5 be given final adoption as presented in Exhibit "A" and as posted in the *Indiana Register*.

Dated: June 18, 2013

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Stephen L. Lucas  
Hearing Officer

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Jennifer M. Kane  
Hearing Officer



## **Exhibit “A”**

### **TITLE 312 NATURAL RESOURCES COMMISSION**

#### **Final Rule** LSA Document #13-3(F)

#### **DIGEST**

Adds 312 IAC 20-4-11.5 to establish a process by which a person may seek dual review and action by the Department of Natural Resources, Division of Historic Preservation and Archaeology, for a project that is potentially subject to both 16 U.S.C. 470f and IC 14-21-1-18 and to provide that the Division Director may issue a letter of clearance to the Indiana Department of Transportation for a qualified bridge project. Effective 30 days after filing with the Publisher.

#### **312 IAC 20-4-11.5**

SECTION 1. 312 IAC 20-4-11.5 IS ADDED TO READ AS FOLLOWS:

#### **312 IAC 20-4-11.5 Dual review proposals**

**Authority:** IC 14-10-2-4; IC 14-21-1-31

**Affected:** IC 14-9; IC 14-21-1-18

**Sec. 11.5. (a)** This section governs a proposal that requires review by the division potentially under both 16 U.S.C. 470f and IC 14-21-1-18.

**(b)** A person may submit a proposal to the division for a project that is subject to review by the division under 16 U.S.C. 470f and IC 14-21-1-18.

**(c)** A person that wishes to make a submission under this section must provide a transmittal letter to the division with "Dual Review Project" in the subject line.

**(d)** Upon receipt of a transmittal letter, the division shall conduct a review that satisfies both:

- (1)** Section 106 of 16 U.S.C. 470f and 36 CFR 800; and
- (2)** IC 14-21-1-18 and this rule.

**(e)** As soon as practicable, the division shall acknowledge to the person its receipt of the transmittal letter. The acknowledgment shall state the division would review the information submitted under the authorities referenced in subsection (d). In addition to any notification required under Section 106 of 16 U.S.C. 470f and 36 CFR 800, the division shall provide notification of the dual review to the following:

- (1)** Interested persons.
- (2)** Members of the review board.
- (3)** By posting on the division's website.

**(f)** If a submission under this section results in a finding under 36 CFR 800 of no historic properties affected or no adverse effect on historic properties, and the Indiana state historic

**preservation officer concurs in the finding, the division director shall issue a letter of clearance for the project under this rule.**

**(g) If a submission under this section results in a finding of adverse effect on historic properties under 36 CFR 800, and a memorandum of agreement is executed under 36 CFR 800, the division director shall consider the terms of the memorandum of agreement. If the division director concludes the objectives and purposes of IC 14-21-1-18 have been achieved, the division director shall issue a letter of clearance under this rule and exempt the person from obtaining a certificate of approval under IC 14-21-1-18 concurrently with the execution of the memorandum of agreement. In addition to any remedy under Section 106 of 16 U.S.C. 470 and 36 CFR 800, the department may initiate an enforcement action under IC 14 to achieve compliance with the memorandum of agreement.**

**(h) If a dual review initiated under this section results in a finding of adverse effect on historic properties under 36 CFR 800, but a memorandum of agreement is not executed, the person making the submission shall obtain a certificate of approval regarding the project from the review board under section 13 of this rule before taking action that would alter the historic significance or character of the site.**

**(i) If the Indiana department of transportation makes a submission for a project involving a bridge covered by the July 17, 2006 "Programmatic Agreement Among the Federal Highway Administration, the Indiana Department of Transportation, the Indiana State Historic Preservation Office, and the Advisory Council for Historic Preservation Regarding the Management and Preservation of Indiana's Historic Bridges", and a finding of adverse effect on historic properties results under 36 CFR 800, the division director shall consider the mitigations prescribed for the adverse effects under the Programmatic Agreement. If the division director concludes the objectives and purposes of IC 14-21-1-18 are achieved, the division director shall issue a letter of clearance under this rule and exempt the person from obtaining a certificate of approval under IC 14-21-1-18. *(Natural Resources Commission; 312 IAC 20-4-11.5)***